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5 **IN THE SUPREME COURT**
6 **STATE OF ARIZONA**

7 IN THE MATTER OF:

8
9 PETITION TO AMEND COMMENT
10 [3] TO ER 8.4, RULE 42, ARIZONA
11 RULES OF THE SUPREME COURT
12

Supreme Court No. R-12-0018

**Comment in Support of Petition to
Amend Comment [3] to ER 8.4, Rule
42, Arizona Rules of the Supreme
Court**

13 I, Amy L. D. Boyle, do hereby submit this Comment in support of Cathi W.
14 Herrod's Petition to Amend Comment [3] to ER 8.4, Rule 42, Arizona Rules of
15 the Supreme Court. Attorney Herrod has petitioned this Court to amend
16 Comment [3] to ER 8.4, Rule 42, Arizona Rules of the Supreme Court, so as to
17 read as follows: "A lawyer may violate this Rule when, in the course of
18 representing a client, (a) the lawyer uses words or engages in conduct that the
19 lawyer knows or should have known invidiously discriminates against, threatens,
20 harasses, intimidates, or defames an individual and (b) those words or that
21 conduct creates a substantial likelihood of material prejudice to the administration
22 of justice by undermining the impartiality of the judicial system. This Rule does
23 not preclude legitimate advocacy. This Rule shall not limit or impair the right of
24 a lawyer to accept, decline, or withdraw from the representation of a client. A
25 trial judge's finding that peremptory challenges were exercised on a
26 discriminatory basis does not alone establish a violation of this Rule."

I support this amendment for the following reasons:

1 First, the amendment – by deleting the current Comment [3]’s references to
2 specially protected persons and groups – is more inclusive than the current
3 Comment [3]. Anti-discrimination provisions should address invidious
4 discrimination against anyone for any reason, not just members of certain
5 specially protected groups. The inclusion of members of specially identified
6 groups leaves people who are not members of those groups unprotected or feeling
7 excluded.

8 Second, the amendment – by deleting references to members of specially
9 protected groups - avoids the problem of having to repeatedly add new protected
10 groups to the list whenever a group believes its characteristics or behavior
11 warrants special protection. We have already experienced this phenomenon in
12 Arizona with the addition of “gender identity” to the list of specially protected
13 groups, and then the attempt last year to add “gender expression” to the list. This
14 process threatens to continue indefinitely.

15 Third, lawyers should only be subject to discipline for serious offenses.
16 They should not face discipline merely because someone finds the attorney’s
17 behavior subjectively offensive. The current Comment does not specifically
18 preclude such subjectively offensive conduct, without more, from forming the
19 basis of a violation. The Petition addresses this issue by making it clear that the
20 only acts that violate the Code are acts of “invidious” discrimination, or acts that
21 threaten, harass, intimidate, or defame an individual, and that create a substantial
22 likelihood of material prejudice to the administration of justice by undermining
23 the impartiality of the judicial system.

1 **CONCLUSION**

2 For the foregoing reasons, I support Ms. Herrod's proposed amendment to
3 Comment [3] to Ethical Rule 8.4, Rule 42 of the Arizona Rules of the Supreme
4 Court.

5 Respectfully submitted this 13th day of April, 2012.

6
7 /s/ Amy L. D. Boyle
Amy L. D. Boyle, AZ Bar No.028302

8 Electronic copy filed with the Clerk
9 of the Supreme Court of Arizona
10 this 13th day of April, 2012,

11 By: /s/ Amy L. D. Boyle

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13 A copy was mailed to:
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21
22 Cathi W. Herrod
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24 this 13th day of April, 2012,

25
26 By: Amy L. D. Boyle